FILE COPY.

FILED.
JAN 21 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1906.

WILLIAM MCKAY, (Substituted for Mary Kaylton) *et al.*,
Plaintiffs in Error,
vs.
AGNES KAYLTON, by Louise Kaylton, her Guardian *ad litem*,
Defendant in Error.
} No. 181.

In Error to the Supreme Court of the State of Oregon.

JOHN B. COTTON,
WM. FRYE WHITE,
For Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1906.

WILLIAM MCKAY, (Substituted for Mary Kaylton) *et al.*,
Plaintiffs in Error,
vs.
AGNES KAYLTON, by Louise Kaylton, her Guardian *ad litem*,
Defendant in Error.

No. 181

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

STATEMENT OF CASE.

This is a suit in equity in the nature of ejectment by Agnes Kaylton, a minor, by her mother as guardian *ad litem*, to establish her right to the possession of a quarter section of land upon the Umatilla Indian Reservation allotted to Joe Kaylton, her father, under the Act of Congress of March 3, 1885, entitled: "An Act Providing for the Allotment of land in Severalty to the Indians Residing on the Umatilla Reservation in the State of Oregon, and Granting Patents therefor, and for other Purposes."

The plaintiff alleged that her father and mother were married according to the customs and habits of the Indians of the tribe to which her father belonged; that she was the

offspring of such marriage, and she contended that under the act of Congress of March 3, 1885, the Act of February 8, 1887, known as the General Allotment Act, and section five of the amendatory Act of February 28, 1891, as such offspring, she was entitled to the possession of the allotted lands of which her father died siezed.

The defendant was a sister of Joe Kaylton, the father of the plaintiff, and upon his death took possession of the allotted lands of which he died siezed, and claimed the right to hold them and enjoy their possession as the sole heir at law of Joe Kaylton, alleging that under the law of the state of Oregon, the father and mother of the plaintiff were not legally married; that the plaintiff was illegitimate, and therefore, under the laws of Oregon, not capable of inheriting land allotted under the act of March 3, 1885.

The Supreme Court of Oregon found that the father and mother of the plaintiff, both Indians, were married according to the custom of the tribe to which they belonged, and the court held that a marriage so consummated, was a lawful marriage according to the laws of Oregon, and that the plaintiff was entitled to the possession of the land in question and entered a decree giving her such possession.

Subsequently the defendant submitted a petition for a rehearing. This petition was not incorporated as a part of the record in this court, and hence, the points raised thereby can only be determined by reference to the opinion of the court refusing the rehearing. They were, as appears from examination of the opinion; first, the question of the jurisdiction of the state court over the subject matter; and, second, the necessity of the United States as a necessary party defendant. The court maintained its jurisdiction of the subject matter and held that the United States was not a necessary party.

Thereupon the defendant came to this court on writ of error assigning the following errors:

1. That the Supreme Court of the State of Oregon erred in holding and deciding that the marriage between Joe Kaylton and plaintiff's (defendant in error) mother, according to the customs of the Cayuse Indians which was consummated after the Act of Congress of February 8, 1887, commonly called the "Dawes Act" (24 St. U. S., 390, c. 119, section 6, 3d Fed. St. Ann., 496), was a legal union under the Act of Congress of February 28, 1891.

2. In holding and deciding that the courts of Oregon had jurisdiction of the subject matter of this suit, and in not holding that the United States Circuit Court for the District of Oregon, had exclusive jurisdiction thereof.

3. In holding and deciding that the United States government as trustee for said defendants, is not an indispensable party to this suit.

The Act of March 3, 1885, in so far as it is of importance in this case, is as follows (23 Stat., 340):

> "Chapt. 319.—An act providing for allotment of lands in severalty to the Indians residing upon the Umatilla Reservation, in the State of Oregon, and granting patents therefor, and for other purposes."
>
> "Whereas the confederated bands of Cayuse, Walla-Walla, and Umatilla Indians, residing upon the Umatilla Reservation, in the State of Oregon, have expressed a willingness to settle upon lands in severalty on their said reservation, and to have the residue of their lands not needed for such allotment sold for their benefit: Therefore,
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States cause lands to be allotted to the confederated bands of Cayuse, Walla-Walla, and Umatilla Indians, residing upon the Umatilla Reservation, in the State of Oregon, as follows, of agricultural lands:
>
> "To each head of a family, one hundred and sixty acres; to each single person over the age of eighteen

years, eighty acres; and to each child under eighteen years of age not otherwise provided for, forty acres." * * * * * * * * * *

"The president shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States shall convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have executed, except as hereinotherwise provided:" * * *

We have not quoted such parts of the act as deal solely with procedure, etc.

The Act of February 8, 1887, so far as it is of importance in this case, is as follows (24 Stat., 390):

"Chapt. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause such

reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

"To each head of a family, one-quarter of a section;

"To each single person over eighteen years of age, one-eighth of a section;

"To each orphan child under eighteen years of age, one-eighth of a section; and

"To each single person under eighteen years of age now living or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section; *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual."

* * * * * * * * * *

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue the reform in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, to his heirs according to the laws of the State or Territory where such land is

located, and that at the expiration of said period the United States will convey the same by patent for said Indian; or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all the lands in the Indian Territory which may have been allotted in severalty under the provisions of this act:"

* * * * * * * * * *

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a mem-

ber of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any Indian to tribal or other property."

* * * * * * * * * * *

"Sec. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order."

* * * * * * * * * * *

We have not quoted such parts of the Act as deal solely with procedure, etc.

The Act of February 28, 1891, so far as it is of importance in this case, is as follows (26 Stat., 794):

"Chapt. 383.—An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled, 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes.'"

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the act entitled, 'An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, be, and the same is hereby, amended so as to read as follows:

"'Sec. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty

stipulation or by virtue of an Act of Congess or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause such reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land; *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided the land in such reservation or reservations shall be allotted to each individual pro rata, as near as may be, according to legal subdivisions: *Provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided, the President, in making allotments upon such reservation, shall allot the land to each individual Indian of said classes belonging thereon in quantity as herein provided: *Provided further*, That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantity substantially as therein provided, allotments may be made in quantity as specified in this act, with consent of the Indians, expressed in such manner as the President, in his discretion, may require: *And provided further*, That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities."

"'Sec. 2. That where allotments have been made in whole or in part upon any reservation under the provisions of said act of February eighth, eighteen hundred and eighty-seven, and the quantity of land in such reservation is sufficient to give each member of the tribe eighty acres, such allotments shall be revised and equalized under the provisions of this act: *Provided*, That no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity.'"

* * * * * * * * * *

"Sec. 5. That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken, and deemed to be the legitimate issue of the father of such child."

* * * * * * * * * * *

We have not quoted such parts of the act as deal with procedure, etc.

Points of Argument.

1. This court has no jurisdiction to review this cause on writ of error because no title, right or immunity specially set up or claimed under any Federal Statute, has been denied.

2. That if the court below erred as specified in assignment of error number one, in holding that the marriage of Joe Kaylton and Louise was a legal marriage under the Act of Congress of February 28, 1891, it was an immaterial error and one which can not in the nature of things be prejudicial to the party against whom the decision was rendered, and that, therefore, if the relief granted is correct according to law, this court will not reverse the decision below.

3. That the provisions of the Act of Congress of February 8, 1887, and section five of the amendatory act of February 28, 1891, apply to lands allotted under the Act of Congress of March 3, 1885, and that, therefore, the court below having found that Joe Kaylton and Louise, Indians residing upon the Umatilla Reservation, were married according to the customs and habits of such Indians, and

having found that the plaintiff was the offspring of such marriage, it committed no error in holding and decreeing that the plaintiff should have the possession of the land of which her father as an allottee, died seized.

4. The Supreme Court of Oregon had jurisdiction of the subject matter and the Act of Congress of August 15, 1894, did not oust the jurisdiction of the State court and place it exclusively in the Circuit Court of the United States for the District of Oregon, but the jurisdiction as between these courts is concurrent.

5. The Supreme Court of the State of Oregon having jurisdiction of the subject matter, the United States is not a necessary party defendant.

Argument.

WE SUBMIT THAT THIS WRIT OF ERROR SHOULD BE DISMISSED BECAUSE THE COURT BELOW WAS NOT CALLED UPON TO AND DID NOT, IN FACT, PASS UPON OR DECIDE ANY QUESTION WHICH BY THE TERMS OF SECTION 709, R. S. U. S., IS MADE THE BASIS UPON WHICH THE JURISDICTION OF THIS COURT MUST DEPEND.

Examination of the record here discloses that there was no question involved as to the validity of any treaty or statute or authority exercised under the United States. Nor was there any question involved as to the validity of any state statute upon the ground of repugnancy to the Federal Constitution. Nor, as we view the record, was there any title, right, privilege, or immunity under any law of the United States specially set up or claimed by the party against whom the decision below was rendered. The record in the answer (Transcript, p. 16), the decree (p. 35), and the opinion (p. 29) of the court below discloses that the defendant based her claim to the right of possession

of the land in controversy, solely on the ground that she and not the plaintiff, was the sole and only heir at law, *under the laws of the State of Oregon,* of Joe Kaylton, deceased (her brother), and that as such heir at law, she was entitled to the possession of the allotted land of which her brother died seized. She contended that the father (her brother) and mother of the plaintiff, *were not married according to the law of Oregon,* and that the offspring, the plaintiff, was *illegitimate under the laws of Oregon,* and, therefore, not entitled to the possession of her deceased father's allotted lands.

The marriage in question between Joe Kaylton and Louise having been found by the court, as a matter of fact, to be in conformity with the Indian custom, it was held as a matter of law *to be a legal marriage according to the state law;* and the conclusion then reached was that the plaintiff, the offspring of such marriage, was the sole heir at law of her father under the law of Oregon, and as such was entitled to inherit the allotted lands of which her father died seized.

Reference to the Act of March 3, 1885, quoted in part, *supra,* discloses the following provision: "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, *of his heirs according to the laws of the State of Oregon,* and that at the expiration of said period the United States will convey by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided, That the law of alienation and descent in force in the State of Oregon shall apply thereto* after pat-

ents have been executed, except as herein otherwise provided." (Italics ours.)

The Act of February 8, 1887, contains similar language.

It is plain from the reading of these acts that any question arising as to inheritance, was to be decided according to the law of the state. That was made by the act the only law which would measure the rights of parties claiming the lands of a deceased allottee. This suit, so far as the defense is concerned, was contested solely upon the ground of the application of the state law of Oregon to the situation of the parties, and we contend that in no sense was any title specially set up by the losing party depending upon any Federal law.

The case of Corkran Oil and Development Company vs. Arnaudet, 199 U. S., 182, is similar in principle to this cause. There the act of Congress under which both parties claimed title to the land in dispute, provided in section two:

> "That nothing contained in this act shall in any manner abridge, divest, impair, injure, or prejudice any valid right, title, or interest of any person or persons in or to any portion or part of the lands mentioned in said first section, the true intent of this act being to relinquish and abandon, grant, give, and concede any and all right, interest, and estate, in law or equity, which the United States is or is supposed to be entitled to in said lands, in favor of all persons, estates, firms, or corporations who would be the true and lawful owners of the same under the laws of Louisiana, including the laws of prescription, in the absence of the said interest and estate of the United States."

And the Supreme Court of Louisiana decided the rights between the parties by the application of a state statute of limitation. This court dismissed the writ of error on the ground that no Federal question was involved, and Chief Justice Fuller in delivering the opinion of the court, said:

> "If it be conceded that the plaintiff specially set up and claimed title to the land in controversy under the Act of Congress of February 10, 1897, that would not be sufficient to give jurisdiction unless the state court had decided against such title. What was decided was that the prescribed period having elapsed, article 233 of the Louisiana constitution operated as the equivalent of legal title through the tax deed. The correctness of this conclusion depended on the proper construction and application of the provisions of the state constitution on the facts found, and not on the Constitution or laws of the United States."

And so in this case if it be conceded that the defendant specially set up and claimed title to the land in controversy under the Act of March 3, 1885, yet that act having made the state law the criterion of decision as to matters of inheritance, and the state court actually deciding against defendant's claimed title, by the application of state law to the facts, in no sense was a Federal law involved in the decision.

Nor was any right, title or immunity specially set up or claimed under a Federal statute, involved in the determination by the court in refusing a rehearing upon the petition for a rehearing; as has been stated, the defendant has not made his petition for a rehearing a part of this record, and the points raised by him in that petition can only be judged from the opinion of the court in refusing the petition. The sole questions disclosed in the opinion of the court were (1) whether the Supreme Court of Oregon had jurisdiction of the subject matter, and (2) whether the United States was a necessary party. There is nothing in the opinion which discloses that the court was asked to pass upon any immunity from suit in the state court because of the existence of a Federal statute which gave to any other court jurisdiction of such subject matter as was involved in this cause. This question as appears from the opinion, was decided by the application of general principles of law.

Nor does it appear that the contention that the United States was a necessary party defendant, depended upon any claim that the United States was such necessary party on account of any provision of a Federal statute. This again appears by the opinion of the state court to have been decided solely upon general principles.

This court has many times held that it is too late to raise by a petition for rehearing a Federal question in order to give this court jurisdiction on writ of error, although it has been held that if the record disclosed that a hearing was had upon the petition for a rehearing, and in denying the petition, the state court has actually or necessarily passed upon Federal questions raised by the petition, this court will consider such questions seasonably raised.

Mallet vs. North Carolina, 181 U. S., 592;
Loeber vs. Schroeder, 149 U. S., 580;
McMillian vs. Ferrum Mining Co., 197 U. S., 347.

We contend that in this case that not only does the record not disclose that any Federal queston was raised by the petition for a rehearing for the very good reason that the petition for rehearing is not incorporated in this record, but that the court upon the hearing upon the petition for a rehearing, did not base its decision upon the consideration of a Federal question. We, therefore, ask that the writ of error may be dismissed as not involving any Federal question of which this court has jurisdiction.

2. *But if the court finds that it has jurisdiction of this cause upon the writ of error, we contend that the errors assigned are not well taken.*

Assignment number one is that "the Supreme Court of the State of Oregon erred in holding and deciding that the marriage between Joe Kaylton, the plaintiff's (defendant in error) mother, according to the customs of the Cayuse Indians, which was consummated after the Act of Congress

of February 8, 1887, commonly called the "Dawes Act" (24 St. U. S., 390, c. 119, section 6, 3d Fed. St. Ann, 496), was a lawful union under the Act of Congress of February 28, 1891."

We are constrained to admit that the construction given by the state court to the acts of Congress referred to in this assignment of error, is not a proper construction thereof, but we contend that the error committed is an immaterial error, and one which could not, upon the merits of the case, prejudice the defendant. *The state court construed the acts of Congress solely for the purpose of determining the personal and political status of the Indians affected, because in its view of the case, the status of the Indian fixed the question as to whether a marriage to be valid according to the law of the state must be a marriage consummated according to the strict formalities provided by its statutes, or whether the Indians could be considered a political entity and the comity in relation to marriage extended to them the same as to parties married in other political communities according to the law thereof. That is to say, the state court of Oregon construed these acts of Congress not to have disrupted the tribal relation of the Indians affected by their terms, and held that marriages consummated according to the customs of the tribe were legal marriages according to the laws of Oregon.*

The logical and only result of such construction was to hold that the plaintiff, the offspring of such marriage, was entitled to inherit from her father under the laws of Oregon. A *proper construction* of these acts of Congress *would result in the same conclusion, but for different reasons,* hence we say, that although the court may have committed error in holding that the marriage of the father and mother of the plaintiff was a legal marriage under the acts of Congress, it is immaterial error and one which would not justify this court in reversing the decision of the court be-

low. In fact it was not necessary for the court below to have looked to the acts of Congress to determine the question of the legality of Indian marriages, for the Act of Congress of February 8, 1887, having made Indians affected thereby, citizens of the United States, it was no longer within the power of Congress to determine what should be or what should not be, the criterion of legal marriage among the Indians; that was a matter which then became one wholly of state authority.

This is a case in which the court below has reached a proper decree, but its reasons and arguments are faulty. This court will not reverse a state court upon such conditions, for upon reversal the state court could only correct its opinion. Its decree would remain unaltered. As this court said in Erwin vs. Lowry, 7 How., 172:

> "The whole proceeding commencing with the petition of Andrew Erwin demanding a seizure and sale, to James Erwin's deed from the marshal, was the exercise of one authority; and the question submitted for our consideration is, whether the marshal's sale was void on any legal ground; that is to say, whether the deed by the marshal to James Erwin was void for the reason that it was not supported by a lawful judgment, or that, for want of a compliance with any legal requirements in conducting the seizure and sale, the deed was void. *If void on any one ground, it would be altogether useless to reverse the judgment because an error had been committed on some other ground; as, on the cause being remanded, the state court would pronounce the deed void a second time on the true ground.* This court was compelled to so hold in Collier vs. Stanbrough, 6 How., 14." (Italics ours.)

This court does not sit for the purpose of correcting errors in opinions and reasoning of state courts, but to decide if the judgment rendered is sustainable in law. The de-

cree entered by the Supreme Court of Oregon is correct and ought to be affirmed.

WE SUBMIT THAT THE ACT OF CONGRESS OF FEBRUARY 8, 1887, WAS A GENERAL ALLOTMENT ACT APPLICABLE TO THE UMATILLA RESERVATION AND TO ALLOTTEES UNDER THE ACT OF MARCH 3, 1885; THAT THE FIFTH SECTION OF THE ACT OF CONGRESS OF FEBRUARY 28, 1891, IS ALSO APPLICABLE TO THE UMATILLA ALLOTTEES, AND THAT UNDER SECTION FIVE JUST MENTIONED, THE STATE COURT HAVING DETERMINED AS A MATTER OF FACT THAT THE FATHER AND MOTHER OF PLAINTIFF WERE MARRIED ACCORDING TO THE CUSTOM OF THE TRIBE, ITS CONCLUSION THAT SHE WAS ENTITLED TO THE POSSESSION OF HER DECEASED FATHER'S LAND, WAS CORRECT.

In determining whether Congress intended the Act of February 8, 1887, to ge a *general* act of universal application in *all* its provisions to *all Indians* upon the reservations, it is helpful to investigate briefly the legislative history of the treatment of the Indians by Congress in the matter of allotment of lands in severalty.

It is a well known fact that the United States in its capacity as "guardian of the Indians," has steadily been endeavoring to induce the Indians to surrender the customs and habits of Indian life, and hasten the time when the Indians would become fit to be citizens of the United States and entitled to all rights and privileges as such.

In carrying out this object one of the methods adopted by the Government has been to allot and patent lands to Indians in severalty, the belief being that this would instill in the Indian allottee a spirit of independence and thrift and a realization of the rights and duties dependent upon the

control and ownership of lands in his own right, a result not fostered by the irresponsibility of ownership in common to which the Indians had long been accustomed.

This purpose has been evidenced both in treaties and in special acts conferring upon various tribes the right to have lands within the reservations allotted in severalty, the Indians being subject after allotment to the general control and direction of the United States in the use of their lands. The policy of the Government has been to retain in trust the fee title to the allotted lands for various periods of time. This has been done in all the acts of Congress applicable to allotments in severalty, and is but an indication of the belief of Congress that the Indians had not reached that point where an absolute fee simple title could be safely given.

The Act of Congress of March 3, 1885, provided for allotments and patents to Indians residing upon the Umatilla Reservation in the State of Oregon. This act provided that the Indians should be allotted lands in certain quantities and patents should be issued therefor which in terms should state that the United States would hold the land thus allotted, for a period of twenty-five years in trust for the sole use and benefit of the allottee and *his heirs according to the law of the State of Oregon. The act further pro*vided that "the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed except as herein otherwise provided."

An examination of the preamble and enacting clause of the Act of February 8, 1887, discloses that it was in terms a general act; the language of the preamble is:

> "An act to provide for the allotment of lands in severalty to Indians on the *various reservations* and to extend the protection of the laws of the United States and the Territories over *the* Indians, and for other purposes."

The language of the enacting clause is:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That *in all cases* where *any tribe* or band of Indians *has been* or shall hereafter be *located* upon *any* reservation created for their use either by treaty stipulation or *by virtue of an act of Congress* or executive order, setting apart the same for their use," etc.

The language of this preamble and enacting clause certainly indicate that this act was a general act applicable to *all Indians* living upon reservations whether created by treaty, by previous act of Congress or by executive order. We believe that if nothing else in this statute of February 8, 1887, assisted in the determination of the question as to whether this was a general act and intended as a substitute for all previous acts relating to the same subject matter, that this preamble and enacting clause would be sufficient. But we think there is in the act other language which bears out this contention. Congress was, of course, cognizant of its previous legislation, and must have known that some of these previous acts may have provided for allotments in amount larger or smaller than those provided for in the act under consideration. Consequently in carrying out the intention to treat all Indians alike, and possible in a spirit of fairness to those Indians who had already under previous acts, been allotted lands in excess of the provisions of the act of February 8, 1887, and had for varying lengths of time enjoyed them, Congress in section one under a proviso, enacted: *"Provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities *in excess* of those herein provided, the President in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act." It will be noted, however, *that Con-*

gress does not in this act either by proviso or otherwise, provide that these acts or treaties shall be recognized wherein provision is made for allotments in less amount than that provided for in the Act of 1887. With the broad general language of the preamble and the enacting clause and the proviso just referred to, before us, are we not driven to the conclusion that these previous acts in so far as they provide for allotments *in less quantity* than that provided for in the Act of 1887, are to that extent, at least, repealed and modified?

This act also contains in *section six* another provision of the utmost importance to the Indians, and one which must be held to apply to all Indians.

This section presents a further argument and we believe a conclusive one, that the Act of 1887 was intended to apply, as its preamble and enacting clause say, *to all Indians on the various reservations.* No reason can be assigned why Indians who had received allotments years before, and had had the benefits to be derived from the possession of such lands in severalty, should be treated differently in that most important feature covered by section six referred to. That section provides "that upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws both civil and criminal of the state or territory in which they may reside," and again in a subsequent clause "and every Indian born within the territorial limits of the United States *to whom allotments shall have been made under the provisions of this act or any law or treaty*, and every Indian born within the territorial limits of the United States, who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States,

and is entitled to all the rights, privileges and immunities of such citizens. * * *"

By the terms of this section any Indian who had under any previous special law or treaty, received an allotment of land in severalty, is declared a citizen of the United States.

Again, it would have been a simple thing and under the circumstances a most logical thing, if Congress had intended that the provisions of the special Act should remain in full force and effect, to have excepted the Indians provided for in such previous special acts, from the provisions of the Act of 1887.

It is significant that in section eight of this statute, Congress did except certain Indians from the provisions of this act; and it is also significant that none of them included Indians who had been provided for in previous special acts. Congress for some reason which we can not attempt to propose, saw fit at this time, to treat the Indians excepted in this act, in a different manner.

Construing this statute as we have, we believe that we are compelled to the conclusion that it was the intention of Congress that this Act should be of general application and a substitute for all previous special acts relating to the same subject matter.

It is not necessary that Congress should specifically repeal previous acts, or extend the provisions of the subsequent act in terms to the beneficiaries of the prior act; it is true that the courts do not favor repeal by implication, but the rule of law in respect to such repeals has been very plainly laid down by this court in numerous cases. Take for instance, the case of the United States vs. Tynen, 11 Wallace, 88, page 92, the court said:

> "When there are two acts on the *same subject*, the rule is to give effect to both if possible, but if the acts are repugnant in *any* of their provisions, the latter act

> *without any repealing clause operates* to the extent of the repugnancy as a repeal to the first, and even where the two acts are not in express terms repugnant, *yet if the latter covers the whole subject of the first and embraces new provisions plainly showing that it was intended as a substitute for the first* act, it will operate as a repeal of that act."

We have pointed out that in the proviso in section one of the Act of 1887, Congress recognized that this act was repugnant to some of the provisions of the previous special acts, for otherwise there would have been no excuse for the proviso. And even if the Acts of 1887 and 1885 were not repugnant, yet it is perfectly clear that the former covers the whole subject matter of the latter, and does embrace new provisions, such as the amounts of allotments, and section six which show an intent to substitute the former for the latter within the meaning of the language in the Tynen case, *supra.*

In *ex parte* Crow Dog, 109 U. S., 556, this court cited and quotes from the English case of Thorp vs. Adams, L. R. 6 C. P., 135:

> "The general principle to be applied to the construction of acts of parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together."

It is apparent that the Act of 1885 as well as other special acts, are *expressly referred* to in the Act of 1887, wherein the language occurs in the proviso above referred to: "That where the treaty or Act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantity in excess of those provided for herein," and again in section six where the statute provides "that upon the com-

pletion of *said allotments* and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws both civil and criminal, of the state or territory in which they reside;" and again in the same section where it is provided *"and every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty."*

Again in Parquete Habana, 175 U. S., 677, on page 685, the court said:

> "As was long ago settled by Chief Justice Marshall, 'the spirit as well as the letter of the statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.' "
>
> Deurosseau vs. United States, 6 Cranch, 344.

And the court reiterates what was expressed in the quotation already made from the Tynen case, *supra.*

We believe and we submit, that the whole context of the law of 1887, demonstrates a *particular intent* on the part of Congress to provide for and define a uniform treatment of *all* the Indians on *all* the reservations within the United States with the exception of those particularly excepted from the provisions of the act in section eight.

Reference to the Congressional Record bears evidence of the intent or purpose which Congress had in mind in the passage of the statute of 1887, and this evidence bears out the contention which we have been making that the Act of 1887, was a general act intended to apply to all Indians irrespective of whether previous special allotment statutes had been passed respecting them, or not.

Mr. Teller, in the Senate, page 1763, 49th Congress, 1st Session, in discussing the bill, said:

> "I want to see this principle applied to all reservations because the great mass of Indians are not on executive order reservations; the great mass of Indians are on reservations established either by treaty or by act of Congress, and we are not now treating as we were the other day, with the Sioux tribe. *We are making general law for governing the Indians of the United States.*"

And Mr. Skinner, in the House of Representatives, page 190, 49th Congress, Second Session, in presenting the bill for consideration to the House said: "Mr. Chairman, from the beginning of our existence as a nation, the Indian has been subject to national legislation, *but at no time so much as now, has there been such pressing necessity for the adoption of a general Indian policy;* the enactment of some measure that will lead to a correct solution of the Indian problem." He then proceeded to take up this bill.

Mr. Justice Harlan in the opinion delivered by him in United States vs. Rickert, 188 U. S., 432, speaks of the Act of February 8, 1887, as "The General Allotment Act," p. 435, and this court has several times construed the act, and it has never been contended or suggested that this act was not general and furnished the rule for allotment both as to quantity and quality and the political status of *all* the Indians on *all* the reservations.

If, as we insist, the Act of February 8, 1887, is a general law applicable in all its particulars, to all Indian allottees, whether allotments have in fact been made under the Act of February 8, 1887, or under previous special acts, then the Act of February 28, 1891, which in its terms is amendatory of the Act of February 8, 1887, also applies in all particulars to Indians affected by any previous acts, and in particular to the Act of March 3, 1885, involved in this case.

The Act of February 28, 1891, as stated in the preamble is "An act to amend and further *extend the benefits* of the Act approved February 8, 1887, entitled:

> "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the application of the laws of the United States over the Indians, and for other purposes."

The act then proceeds to amend section one of the Act of 1887, by providing for the equalization of allotments to Indians "located upon *any* reservation created for their use either by treaty stipulation or by virtue *of an act of Congress.* * * *"

The proviso of the Act of 1887 in reference to the allotments in excess of those provided by the Act of 1887, is again incorporated. Section two of the Act of 1891 provides for the revision and equalization of allotments under provisions of this act providing, however, "that no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity."

Section five of the Act of 1891 is the section to which we call particular attention, and which furnishes the criterion for the proper decision of this case. It is in these words:

> "That for the purpose of determining descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purposes aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child otherwise illegitimate shall for such purpose, be taken and deemed to be the legitimate issue of the father of such child."

It will be remembered that section five of the Act of 1887, which is referred to in section five of the Act of 1891, just quoted, is the section which provides the manner in which the patents shall be issued to the Indians, the

quality of the title given to the Indians, and under a proviso, enacts "that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered except as herein otherwise provided."

Now, if section five of the Act of 1887 does apply, as we contend, to allotments made under the Act of 1885, then section five of the Act of 1891, also applies.

The next point for determination is the meaning and purpose of Congress in the enactment of section five of the Act of 1891. It will be noted that the broad language of section five of the Act of 1887 in reference to the application of state laws, and of section six, which subjects Indian allottees to the laws both civil and criminal of the state and territory within which the reservation is located, would give to the courts as a measure or standard of legal marriage and of legitimacy, the measure or standard provided by the laws of the respective states. Questions of descent often involve the determination of legal marriage and legitimacy.

We must remember that Congress in these acts is dealing with a peculiar race. A race which has withstood the forces of civilization in a remarkable degree, and probably in no particular have they progressed so little as in their marital relations. It was, therefore, a far reaching advance when Congress in the Act of 1887 provided that the laws of the state should determine questions of descent, which, as we have stated, necessarily involve oftentimes, questions of legal marriage and the legitimacy of offspring. It is not strange under the circumstances, that difficulties should arise in the application of state laws, due to the fact that the Indians insisted upon retaining their own customs and habits of marriage and refused to recognize the benefits to be derived by following the laws of the respective states in such matters.

We believe that the existence of the fifth section of the Act of 1891, is but the expression of the congressional will that in so far as the inheritance of these particular Indian lands was concerned, the strict rule of marriage and legitimacy of the states should be suspended, and the inheritance allowed to offspring of parents married according to the Indian custom, or to offspring as the section says "otherwise illegitimate." *The section does not pretend and can not be construed to be an attempt to withdraw the Indian from the obligation to marry according to the law of the state which obligation was a necessary resultant of the extension of citizenship both of the United States and the state; Congress could not constitutionally legislate for the states.*

It should be remembered that Congress was dealing with the inheritance of its own lands. That is to say, that while the Indians had received patents, which as Mr. Justice Harlan said in the Rickert case, *supra,* were mere "memoranda" of allotments, which stated the condition of allotment and a promise of future title, the United States still retained the legal title, and with that title could deal as it saw fit.

Many cases in this court have stated that the title to these lands remained in the United States and that Congress could legislate in regard to them. The state can not tax them during the trust period. Rickert case, *supra.* Retaining the legal title it is within the power of the United States to deal with them as it wills. The declaration of trust made as to those lands is a mere gratuity, without consideration; Congress attached certain conditions to the trusts. It could attach others at any time which to it might seem to be to the advantage of the Indians. The condition that the right to the benefit of the trust should descend according to state law, *was one of these conditions;* that the Indians should not alien or lease except upon certain conditions, was another. If Congress found (as it undoubtedly did) that the appli-

cation of the strict and highly moral law of a state as to marriage and legitimacy in so far as these matters affected inheritance was in fact working or likely to work hardship upon the Indians, it was surely within the power of Congress to modify the condition. Congress intended the allotments solely for the benefit of the Indians. It was thought better to overlook the infractions of the state law and temporize with the Indians, giving the *benefit of the allotments to issue legitimate or illegitimate.*

The section in question did not encourage laxness in the marriage formality, but extended charity to the poor Indian who did not rise to the dignity of the state formality.

The Supreme Court of Oregon in holding that the father and mother of the plaintiff were married according to the customs of the tribe, and that the plaintiff was the offspring of such marriage, was simply finding the presence of the conditions furnished by section five, and it decided correctly that the plaintiff was entitled to the possession of the land in suit.

THE SUPREME COURT OF OREGON HAD JURISDICTION OF THE SUBJECT MATTER, AND THE ACT OF CONGRESS OF AUGUST 15, 1894, DID NOT OUST THE JURISDICTION OF THE STATE COURTS.

The second assignment of error is as follows:

2. In holding and deciding that the courts of the state of Oregon had jurisdiction of the subject matter of this suit, and in not holding that the United States Circuit Court for the District of Oregon had exclusive jurisdiction thereof.

The following extract from the opinion of the court below, page 38 of the transcript, epitomizes its reasons for maintaining its jurisdiction:

> "In the case at bar Joe Kaylton was entitled, during his life time, to the possession of the land allotted to him and upon his death, his heirs, under the law of

descent in this state, succeeded to his right in the premises. This possession having been disturbed by one who is not his successor in interest or estate, according to such law, the rule established in this state makes it incumbent upon our courts, in aid of the beneficient policy adopted and pursued by the general government in caring for the Indians and in trying to promote their civilization, to declare by solemn decree who is his legal heir."

The jurisdiction exercised by state courts over citizens of the state in matters involving the right to possession of lands entered under the homestead laws is precisely the same as that exercised over Indians claiming the right to possession of allotments held in trust by the United States. In both cases before final patent is issued the title to the property is in the United States, and there is only a right of entry to the possession in one or the other of the claiming parties. That the state courts have exercised jurisdiction over these matters, is well known. In Kitcherside vs. Myers, 10 Oregon, 21, it was held that where a person who had taken the initiatory steps to secure title to public land, received from the proper officer the necessary evidence thereof, he was entitled to the possession of the premises selected and for any interference therewith by another without legal title or equitable claim, a state court, upon application of the entryman, would put him in possession of his rights. Any unlawful interference with the possession of a person entitled to possession of land to which the United States hold title will be prevented by the state courts.

Jackson vs. Jackson, 17 Oregon, 110.
Hindman vs. Rizor, 21 Oregon, 112.
Allen vs. Dunlap, 24 Oregon, 229.
Bishop vs. Baisley, 28 Oregon, 119.
Pacific Live Stock Co. vs. Gentry, 38 Oregon, 275.
Browning vs. Lewis, 39 Oregon, 11.
Moore vs. Halliday, 43 Oregon, 243.

The same thing was held in the case of Bird vs. Winver, 64 Pac., 178; Swartzell vs. Rogers, 3 Kans., 374.

The Supreme Court of the United States in the case of Felix vs. Patrick, 145 U. S., 317, 332, said:

> "Nor did their heirs apparently make any effort to discover it until 1887, when their intelligence seems to have suddenly sprung into activity upon their becoming citizens of the United States. It is scarcely necessary to say in this connection that while until this time they were not citizens of the United States, capable of suing as such in the federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color."

The Supreme Court of the State of Washington in the case of Bird vs. Winyer, 64 Pac., 178, announces the same doctrine, also, the State of Idaho in the case of Wa-la-note-tke-tynin *et ux.* vs. Carter *et al.* found in the 53 Pac., 106.

Swartzell vs. Rogers, 3 Kan., 374.
Felix vs. Patrick, 145 U. S., 332.

The state courts also have jurisdiction to determine who are the heirs of deceased persons; this jurisdiction can not be questioned. In Klayton vs. Klayton, 78 Pac., 332, that authority is affirmatively asserted.

The state courts have repeatedly exercised jurisdiction in cases involving rights to allotted lands.

Mosgrove vs. Harper, 33 Ore., 252.
Carter vs. Wann, 57 Pac., 314 (Idaho).
McBean vs. McBean, 61 Pac., 418.
Wa-la-note-tke-tynin *et ux.* vs. Carter *et al.* (Idaho).

A tribal Indian whether he be a citizen or not may maintain actions in the state courts to redress any wrong committed against either himself or his property.

Selkirk vs. Stephens, 72 Minn., 335.
Swartzel vs. Rogers, 3 Kan., 374.
Wiley vs. Keokeuk, 6 Kan., 94.
Ingrahm vs. Ward, 56 Kan., 550.
Whirlwind vs. Von der Ahe, 67 Mo. App., 628.
Felix vs. Patrick (C. C.), 36 Fed., 457.
Y-ta-tah-wah vs. Rebock (C. C.), 105 Fed., 257.
Felix vs. Patrick, 145 U. S., 317.
Bem-way-bin-ness *et al.* vs. Eshelby *et al.*, 91 N. W., 291.
16 Am. & Eng. Ency. Law., p. 216.
Stacey vs. LaBelle, 99 Wis., 520.
Mo. Pac. Fy. Co. vs. Cullers, 31 Tex., 382.

State courts have jurisdiction over controversies respecting land lying within the state and belonging to, or claimed by, Indians.

22 Cyc. Law & Procedure, p. 149.
Wright vs. Marsh, 2 Greene (Iowa), 94.
Telford vs. Barney, 1 Greene (Iowa), 575.
Bem-way-bin-ness vs. Eshelby, 87 Minn., 108.
Bird vs. Winyer, 24 Wash., 269.

In cases where jurisdiction depends upon the subject matter of the controversy, the weight of authority seems to favor the right of an Indian to a standing in both the United States court and those of the state.

10 Am. and Eng. Ency. of Law., p. 441.

The constitution of Oregon, section 10, article 1, provides: "That every man shall have remedy by due course of law, for injury done him in person, property or reputation." "Every man" includes Indians who have been made by law citizens of the United States and of the state, as well as any other class of citizens.

If the state court was wrong in maintaining its jurisdic-

tion of this cause it was because the Act of Congress of August 15, 1894, 28 Stat., 305, had the effect of ousting the jurisdiction up to that time residing in the state tribunals over such subject matter and giving it *exclusively* to the circuit courts of the United States. This act, so far as the same is germane to this decision, reads as follows:

> "All persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they may claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto, in the proper circuit court of the United States."

It will be noted that this act confers jurisdiction upon the circuit courts of the United States *affirmatively* for the purposes therein enumerated, but there is no suggestion that that jurisdiction shall be *exclusive*. Whether the federal courts possess concurrent or exclusive jurisdiction under the particular act of Congress depends upon the provisions of the act. In writing upon this subject of jurisdiction and the right of federal courts to hear and determine exclusively, controversies arising under the acts of Congress, Justice Story says:

> "That there are some cases in which that power is *exclusive* can not be well doubted; that there are others, *in which it may be made so by Congress,* admits of as little doubt; *and that in other cases it is concurrent in state courts,* at least *until Congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied.*"

Chancellor Kent says:

> "In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress."
>
> Kent's Com. Lec., 18.

Mr. Abbott says:

> "Whether in a given case Congress had conferred exclusive jurisdiction depends upon the statute conferring it, in the interpretation of which some weight is due to the consideration that in respect to many classes of cases the state courts had jurisdiction prior to the adoption of the Constitution, and that the presumption in such cases is against the alienation or surrender of state power by implication."
>
> Abb. U. S. S. Prac., Vol 1, P. 63.

As was said in Martin vs. Hunter, 1 Wheaton, 304, 337:

> "It is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others may be made so at the election of Congress."

Teal vs. Fulton, 12 Howard, 284, was a case of trover in a justice's court to recover the value of a newspaper received by the defendant, the postmaster, at Syracuse, which he refused to deliver to the plaintiff to whom it was addressed. It was insisted that the courts of New York had no jurisdiction to try the case. This court held that the act of the postmaster was a conversion, and then proceeded to say:

> "His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for

some cause the suit brought is an exception to the general jurisdiction of the court. Now the courts in New York, having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the constitution of the United States. We find in the 25th section of the judiciary act of 1789, under which this act is before us, that such a concurrent jurisdiction in the courts of the states and of the United States was contemplated, for its provision is for a review of cases adjudicated in the former, 'where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.' "

The statutes of the United States are as much the law of the land in any state as are those of the state; and although exclusive jurisdiction for their enforcement may be given to the federal courts, yet were it not given, either expressly or by necessary implication, the state courts having competent jurisdiction in other respects, may be resorted to. In such cases the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. A state court, therefore, can exercise concurrent jurisdiction with the federal courts in cases arising under the constitution, laws and treaties of the United States, where it is not excluded by express provisions, or by incompatibility in its exercise arising from the nature of the particular case.

Bailey on Jurisdiction, sec. 93.
Cliflin vs. Houseman, 93 U. S., 130.

Statutes which merely give jurisdiction affirmatively to one court do not oust that already existing in another.

Black on Interpretation of Law, p. 123.

It can not be contended that the Act of August 15, 1894, expressly confers exclusive jurisdiction on the circuit courts of the United States. *It is affirmative jurisdiction only which is extended.*

Hence, we conclude that before the passage of the Act of August 15, 1894, the state court undoubtedly had jurisdiction to determine who was the heir at law of an Indian allottee, and to protect the person thus found to be an heir, in the possession of that property which was granted him by the terms of an act of Congress.

We conclude further that the Act of August 15, 1894, does not in terms or by necessary implication, oust the fundamental jurisdiction of the state courts, and place it in the circuit courts of the United States, but the grant of jurisdiction in the Act of August 15, 1894, is affirmative only, and leaves such a subject matter as is involved in this cause, subject to the concurrent jurisdiction of the state court and the circuit courts of the United States, at the option of the moving party.

THE UNITED STATES WAS NOT A NECESSARY PARTY DEFENDANT.

Assignment of error number three is as follows:

3. In holding and deciding that the United States Government as trustee for the defendants, is not an indispensable party to this suit.

It is true that the legal title to the property involved in this cause, is in the United States, and that the interest of the Indians is that of a *cestui que trust;* it should be noted, however, that this is not in any sense, a suit to enforce the trust, but is solely for the purpose of protecting the possession of the heir of the Indian to whom this land was allotted in trust.

The state court assumed jurisdiction simply to protect a possessory right, and to establish the identity and status of the person entitled to that possession under the allotment

Act of March 3, 1885, the general Act of February 8, 1887, and the amendatory Act of February 28, 1891.

Had this been a suit brought for the purpose of enforcing the trust, the United States would have been a necessary party and the state courts would have had no jurisdiction; the parties to this suit are citizens of the state of Oregon who have voluntarily submitted themselves to the jurisdiction of its courts, and they are bound by all matters that would properly be at issue in this cause.

This court held in the case of Hy-Yu-Tse-Mil-kin vs. Smith, 194 U. S., 401, a suit brought in a circuit court of the United States under the Act of August 15, 1894, but before the passage of the Act of February 6, 1901, that the United States was not a necessary party. The court said:

> "In our opinion, the claim that the United States must be made a party is without foundation; under the Act of 1894,*supra,* the circuit courts are given jurisdiction to try and determine any action of this nature, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty, * * * 'and the judgment or decree in any such court in favor of any claimant to an allotment of land, shall have the same effect when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *'
>
> "The case at bar was commenced prior to the amendment of the statute of 1894, by the Act of February 6, 1901, 31 St., 760, wherein it is provided that the United States shall be a party defendant, and the case must be considered without regard to this amendment.
>
> * * * * * * * * * * *
>
> "Under this statute there was no provision making it necessary in a private case between two claimants for an allotment of land, to make the United States a necessary party.

> "The contest here is between two Indians who claim the same land; the United States has no interest in the result, and, therefore, is not a necessary party."

If the United States was not a necessary party in a circuit court of the United States in a suit brought under the terms of the Act of August 15, 1894, it certainly was not a necessary party in a suit brought in a state court under its general jurisdiction which had for its object similar relief to that asked for in the suit in the circuit court, *supra*.

We wish to give credit for so much of this brief as deals with Assignments of Error numbers 2 and 3 to James A. Fee, Esq., of Pendleton, Oregon.

We respectfully submit that the decree of the Supreme Court of Oregon should be affirmed.

JOHN B. COTTON,
WM. FRYE WHITE,
For Defendant in Error.